Denied and Disparaged: Madisonian Federalism and the Original Meaning of the Ninth Amendment

A Senior Honors Thesis

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by

Seth Rokosky

The Ohio State University

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Project Advisor: Professor Saul Cornell, Department of History

I. The Ninth Amendment to the United States Constitution:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

II. The Tenth Amendment to the United States Constitution:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

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In 1987, Robert Bork testified before the Senate in a bid for the Supreme Court. When asked about the Ninth Amendment, he compared it to an "ink blot" because no one knows its true meaning. Such an observation seems incredible. How can a provision in the Bill of Rights become ambiguous to legal experts? The importance of the Bill of Rights suggests that the Ninth Amendment once played a key role in the ratification and founding of our nation. Nevertheless, its true meaning remains a puzzle for scholars of early constitutional history.

Bork's testimony sparked heated disagreement about the Ninth Amendment's past, and two scholars led the modern debate. In the late 1980's, Randy Barnett began a quest to identify the original meaning of the Ninth Amendment. He concluded that James Madison intended for it to protect "the people" from forfeiting rights not mentioned in the Constitution. He believed the amendment was ratified in response to objections that the new Constitution did not protect individual rights. Barnett's work was widely accepted by constitutional scholars until 2004, when Kurt Lash published two articles challenging Barnett's interpretation of the Ninth Amendment. According to Lash, Madison proposed the amendment to address states' fears that their powers would be diminished by "latitudinous constructions" of the Constitution. Lash provided evidence for a "federalist" Ninth Amendment, which was intended to prevent the federal government from encroaching on the powers of states. Barnett countered that the weight of evidence supports his "individual rights" model, rather than a "federalist model." Lash struck back that December, arguing that Barnett's "individual rights" model is anachronistic and too narrow. The issue, however, is undecided. A reply from Barnett is surely forthcoming, and the body of evidence is far from exhausted. Furthermore, recent Ninth Amendment scholarship has been scarce apart from the dispute between Lash and Barnett.

My thesis analyzes both scholars' views to determine if either is historically accurate. I carefully trace the evolution of their disagreement, paying special attention to their reliance on vital pieces of historical evidence. I find Barnett's "individual" rights model of the Ninth Amendment to be historically flawed, due to its reliance on a false distinction between "the people" and "the states." Concluding that Lash's "federalism" model is correct, I apply it to modern Ninth Amendment jurisprudence and determine whether the Ninth Amendment establishes a general right to privacy. Finding that it does not, I examine the potential implications of my research and evaluate the Amendment's future.

A. Precursors to the Modern Debate

Prior to the 1980s, most scholars believed that the Ninth Amendment represents a "mere truism" marking the boundary between federal and state power. The Ninth Amendment seemed to ensure that all powers not given to the federal government were reserved to the states. This sounded similar to the language of the Tenth Amendment, which guarantees that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Interestingly, the Ninth Amendment had been paired with the Tenth in recent Supreme Court opinions. For example, in *United Public Workers of America (C.I.O.) v. Mitchell* (1947), the Court found that

> […] when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[1]

A year later, the Court held:

> [the war power] may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well.[2]

[1] Kurt Lash, "The Lost Jurisprudence of the Ninth Amendment," in 83 *Texas Law Review* 3 (February 2005), 696.
[2] Ibid, 694.

When Bennett Patterson wrote *The Forgotten Ninth Amendment* in 1955, he summarized this judicial history by stating that:

> There are a number of cases which briefly mention the Ninth Amendment by grouping it with the Tenth Amendment, [yet] these decisions do not actually discuss the Ninth Amendment, but actually discuss the Tenth […].[3]

Because these cases seemed to reserve powers to the states – a Tenth Amendment issue – the Ninth Amendment seemed to play a small role in the Court's decisions. Patterson's conclusion became the dominant view among constitutional scholars. For years, the Ninth Amendment faded into constitutional obscurity, lying in the darkened shadows of the Tenth Amendment.

Then, in 1989, Judge Robert Bork was nominated for Associate Justice of the Supreme Court, and he discussed the Ninth Amendment in testimony before the Senate. He testified:

> I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.[4]

Because it was always paired with the Tenth Amendment, the Ninth seemed functionless, accompanying the Tenth simply for emphasis. In response to Bork's testimony, scholars began to criticize the accepted view of the Ninth and Tenth Amendments, insisting that an interpretation of the Bill of Rights that made an amendment an "ink blot" must be flawed. The modern debate over the Ninth Amendment's meaning began, spurred by the chance to resurrect a forgotten piece of history.

B. Randy Barnett's Early Work: the "Rights-Powers" and "Power-Constraint" Conceptions

Soon after Bork's testimony, Randy Barnett began to articulate his argument for a libertarian model of the Ninth Amendment. The fundamental debate over the Ninth Amendment, he believed, was over two competing conceptions of its original meaning: the

[3] Ibid, 709.

"rights-powers" and "power-constraint" conceptions. The former was the common view that the Ninth Amendment delineated the proper boundary between state and federal power. The latter held that the Ninth Amendment protected the peoples' individual rights from government control. After concluding that the "rights-powers" conception was untenable, he endorsed the "powers-constraint" alternative.

1. The "Rights-Powers" Conception

Barnett rooted the "rights-powers" conception of the Ninth Amendment in a Federalist argument against a bill of rights. After Anti-Federalists demanded that a bill of rights be added to the Constitution, Federalists countered that it was unnecessary. Because the national government could only exercise specific enumerated powers, they said, it could not infringe upon the peoples' rights without explicit authorization. The rights of the people would not be in danger, because they were already protected by the structure of the Constitution and its principle of limited powers. Therefore, a bill of rights would be redundant.[5]

This "rights-powers" conception of the amendment implied that powers and rights are "logically complementary." Such a relationship between rights and powers was attractive to Barnett. Under the "rights-powers" model, one could derive the vague "other rights" of the Ninth Amendment by examining what the government was expressly empowered to do. Unmentioned powers constituted opposing "rights of the people." Treating rights and powers as logical opposites also had the advantage of avoiding internal discrepancies within the Constitution. It made the document appear coherent.[6]

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[4] Randy Barnett, "A Ninth Amendment For Today's Constitution," in 26 *Valparaiso Law Review* 419 (1991-1992), 419.
[5] Randy Barnett, "Reconceiving the Ninth Amendment," 74 *Cornell Law Review* (1988-1989), 4-5.
[6] Ibid, 5.

Despite its attractiveness, Barnett rejected the "rights-powers" conception for a number of reasons. First, it appeared to imply that the Ninth Amendment is little more than a restatement of the Tenth. According to Barnett:

> The idea that animates the rights-powers conception – that powers not delegated are reserved – is expressed clearly [in the Tenth].[7]

There was no reason for the Framers to restate the Ninth Amendment in terms related to "rights" if the idea was already expressed in the "powers" language of the Tenth. Furthermore, combining the Ninth Amendment with the Tenth would leave the Ninth without a function.[8] Finally, if rights begin where powers end, then an enumerated right could never come into conflict with an enumerated power. This would make the Bill of Rights "merely declaratory." In other words, it would not protect any rights at all.[9]

2. The "Powers-Constraint" Conception

Barnett believed the Ninth Amendment stemmed from a different Federalist objection to the Bill of Rights. Federalists also tried to defeat calls for a bill of rights by arguing that declaring rights would actually be dangerous. Listing certain rights could allow the government to claim that it had all powers not constrained by enumerated rights, and any right excluded from the Constitution would be vulnerable. Thus, Federalists feared that a declaration of rights would allow the government to expand beyond its limited powers to infringe on rights unmentioned in the Constitution.

Barnett offered his "powers-constraint" conception of the Ninth Amendment, suggesting that it was ratified to address this objection. Instead of viewing rights as the residual product of powers, Barnett's "powers-constraint" conception held that rights were actually intended to

[7] Ibid, 6.
[8] Ibid, 6-7.
[9] Ibid.

"constrain" powers to protect unenumerated rights. Though the government may be empowered in some way, it may not use that power in a way that violates the peoples' "rights."[10]

If the "powers-constraint" conception were more plausible, Barnett believed, courts were required to protect unenumerated rights. If unenumerated rights were not protected, they would be "denied or disparaged." Citing instances in which Framers believed a declaration of rights would guard against legislative and executive abuses of power, Barnett believed the purpose of the Ninth Amendment was to be an enforceable protection of the peoples' unenumerated rights.[11] Barnett argued that these liberties included natural rights.[12]

Already, the roots of Barnett's libertarian model of the Ninth Amendment were becoming clear. Because the Ninth Amendment was conceived as a response to Federalist fears that a bill of rights would "disparage" unenumerated rights, the people retained certain rights beyond the scope of government control. The Ninth Amendment served as a constitutional check on federal power, protecting those individual rights.

C. The Popular Sovereignty Alternative: Kurt Lash's Critique of Barnett

Barnett's views about the Ninth Amendment were prominent for nearly a decade. In December of 2004, Kurt Lash published two articles in *Texas Law Review* offering a different conception of the Ninth Amendment from that which Barnett had endorsed. Lash believed Barnett's work was historically flawed. In opposition to Barnett, he argued that the Ninth Amendment was originally intended to work in conjunction with the Tenth to preserve state power. Lash believed the amendment was an expression of popular sovereignty, in which the

[10] Ibid, 9-16.
[11] Ibid, 17-26.
[12] Randy Barnett, "Two Conceptions of the Ninth Amendment," 12 *Harvard Journal of Law and Public Policy* (1989), 37-41.

people wished to protect their right to govern themselves after creating a stronger federal government.

1. "The Lost Original Meaning of the Ninth Amendment"

Kurt Lash's first article, "The Lost Original Meaning of the Ninth Amendment,"[13] claimed to present new evidence in the Ninth Amendment debate. According to Lash, much of it had been "not discussed, missing, or mislabeled throughout contemporary scholarship."[14] Lash believed this evidence showed that the Ninth Amendment was not intended to protect individual rights. Instead, it was conceived as a protection of Madisonian federalism.

According to Lash, the Ninth Amendment was really intended to work in conjunction with the Tenth. Both acted together to preserve federalism and to limit the federal government. Lash's account differed from Barnett's, which held that the Ninth and the Tenth Amendments were distinct. This constituted Barnett's primary objection to the "rights-powers" model, as he claimed that it mistook the "rights" language of the Ninth with the "powers" language of the Tenth, conflating the two and leaving the Ninth without a function.[15]

According to Lash, however, both amendments shared a purpose. While the Tenth Amendment limited the federal government to enumerated powers, the Ninth guarded against interpretations of those powers that infringed on the powers of states. The Framers recognized that the Ninth Amendment was necessary to give the Tenth Amendment force. Limiting the government to delegated powers (the Tenth) was ineffective if those powers could be interpreted as broadly as possible. The Ninth Amendment, therefore, was intended to prevent such an expansive construction.[16]

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[13] Kurt Lash, "The Lost Original Meaning of the Ninth Amendment," 83 *Texas Law Review* 2 (2004).
[14] Ibid, 334-335.
[15] "Reconceiving the Ninth Amendment," 6.
[16] "The Lost Original Meaning of the Ninth Amendment," 336.

When Lash published "The Lost Original Meaning," he believed scholars had interpreted the Ninth Amendment either as a libertarian protection of unenumerated rights ("powers-constraint") or as a rule of construction limiting federal power ("rights-powers"). He classified the libertarian interpretation as "active," because it provided for active judicial enforcement of the amendment. He characterized the other as "passive," because it was viewed as a "mere declaration that enumerated rights do not imply otherwise unenumerated federal power."[17] To illustrate this "passive" view, Lash cited Justice Potter Stewart's dissent in *Griswold v. Connecticut* (1965)*:*

> "[t]he Ninth Amendment, like its companion the Tenth, […] 'states but a truism that all is retained which has not been surrendered."[18]

Such an approach to viewing the Ninth Amendment is reminiscent of Randy Barnett's insistence that:

> The "rights-powers" model "erroneously construes the Ninth Amendment to mean nothing more than what is stated in the Tenth. […] This conception renders the Ninth Amendment effectively inapplicable to any conceivable case or controversy.[19]

According to both Lash and Barnett, a "passive" reading of the Ninth Amendment, stating that powers not delegated to the federal government are rights retained, rendered the amendment functionless.

In "The Lost Original Meaning," however, Lash proposed to take a new, *active* federalist approach to the Ninth Amendment. In doing so, he planned to follow Justice Hugo Black's approach in *Griswold:*

> [the Ninth Amendment was] enacted to protect state powers against federal invasion.[20]

Unlike Barnett, Lash believed the Ninth Amendment was originally viewed as a rule of

[17] Ibid, 346.
[18] Ibid.
[19] "Reconceiving the Ninth Amendment," 6.
[20] "The Lost Original Meaning of the Ninth Amendment," 346.

construction limiting the expansion of federal power to protect that of the states – not the individual rights of citizens.[21]

To support his claim, Lash began by illustrating the contemporary understanding of the amendment's history Barnett had offered earlier: the Ninth Amendment was conceived in Federalist objections against a bill of rights. First, a declaration of rights was unnecessary because the government was limited only to delegated powers, so it could not invade the peoples' rights. Federalists also objected that a declaration of rights would be *dangerous* because it would imply that only enumerated rights were protected from the federal government. This argument was unsuccessful, and James Madison agreed to propose a bill of rights in exchange for ratification. Nevertheless, he included the Ninth Amendment as a remnant of this Federalist objection when he introduced it before Congress:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned to the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights in this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.[22]

Lash insisted that Barnett's history of the Ninth Amendment's origins was incomplete. Though Madison proposed the Ninth Amendment partly in response to the objection that a bill of rights was dangerous, he *also* did so to satisfy specific demands of several states. Lash believed Barnett ignored this chapter of the amendment's history, missing its original purpose.[23]

Lash examined the evolution of the Ninth Amendment, beginning with these state proposals. Fears of enlarging federal powers were widespread during the ratification era, and many states were concerned with the Constitution's lack of safeguards protecting state power

[21] Ibid.
[22] Ibid, 348-349.
[23] "The Lost Original Meaning of the Ninth Amendment," 350.

from an expanding federal government. Accordingly, some states recommended amendments to place a principle of federalism into the proposed Constitution. Thus, the New York Ratifying Convention recommended:

> That every Power, Jurisdiction and Right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.[24]

The first half of this proposed amendment, declaring that those powers not delegated to the federal government are reserved to the states, seemed to have become the Tenth Amendment. What Lash found interesting, however, was the second half of the proposal. In it, the New York Convention claimed that a denial of federal power in some areas does not imply that the government has power in others. This was surprisingly similar to the final version of the Ninth Amendment, which states that the enumeration of rights in the Constitution cannot be construed to deny those retained by the people. According to Lash, this second half was the predecessor of the Ninth Amendment. Thus, New York intended for the Ninth and Tenth Amendments to work together to prevent the expansion of federal power at the expense of the states. The Ratifying Convention proposed both amendments in a single provision. Therefore, they did not have separate aims as Randy Barnett had argued.[25]

Lash continued, showing that other amendment proposals resembled New York's. For example, Rhode Island's was very similar. South Carolina proposed that:

> No section or paragraph of the said constitution warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the union.[26]

[24] Ibid, 355-356.
[25] Ibid, 356.
[26] Ibid.

Pennsylvania also recommended both a principle of enumerated federal power and a rule of construction limiting expansive interpretations of that power.[27] North Carolina's list of amendments included both principles of federalism found in New York's proposals:

> 1. That each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the Federal Government.
> …
> 18. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.[28]

These provisions contained nearly the same language as New York's, such as states "retaining every power, jurisdiction, and right," and a rule of construction ensuring that the enumeration of certain "powers" be read either as exceptions to power or "inserted merely for greater caution." The connection between the state proposals was obvious and revealed a common tie to the Ninth Amendment.

Finally, Virginia's Ratifying Convention, which included James Madison, recommended:

> First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal Government.
> …
> Seventeenth, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.[29]

Each of these state proposals focused on "controlling the expansion of federal power and reserving all non-delegated powers *and rights* to the states."[30] States recognized that the new Constitution threatened their independency in governing local affairs. Therefore, they proposed amendments ensuring that all powers not expressly delegated to the federal government were

[27] Ibid, 357.
[28] Ibid.
[29] Ibid, 358.

reserved to the states. This was useless, however, without an accompanying rule of construction guaranteeing that delegated rights not be *interpreted* or *construed* to infringe on retained state powers. States included both of these provisions in their amendment proposals, and two proposals became the Ninth and Tenth Amendments. Thus, the Ninth Amendment was not a simple protection of individual rights, as Barnett insisted, but also a guarantee to states that they retained their powers.

Lash traced the amendment's evolution from these initial state requests and found that subsequent drafts of the Ninth Amendment retained their ties to the proposals. Madison's first draft read:

> The exceptions, here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.
> …
> The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the States respectively.[31]

Obviously, Madison used the original language of the state proposals, inverting them to place the rule of construction before the principle of federalism. The House Select Committee altered this draft to read:

> The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.
>
> The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively.[32]

The state proposals were obvious precursors to the Ninth and Tenth Amendments, yet the connection between them and the Ninth Amendment had not been emphasized before "The Lost

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[30] Ibid.
[31] Ibid, 360.
[32] Ibid, 368.

Original Meaning."[33] The Ninth Amendment's origin suggested its role in the preservation of state power.

In the rest of his article, Lash produced more unexamined evidence to corroborate his view of the Ninth Amendment. He showed that the Virginia Assembly resisted the Bill of Rights because it rejected the Ninth and the Tenth Amendments. The Governor of Virginia, Edmund Randolph, was unhappy that the "powers" language of Virginia's proposed Seventeenth Amendment (which later became the Ninth) was changed to "rights retained." Removing specific language prohibiting the expansion of federal power, while keeping the language of "retained rights," destroyed the purpose of the amendment.[34] Madison, however, believed:

> If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall be not abridged, or that the former shall not be extended.[35]

Madison allowed changes in his draft of the Ninth because the final version still preserved its rule of construction prohibiting expanded federal power, but Randolph complained that the final version of the amendment made this rule of construction implied rather than expressed:

> [the Ninth Amendment] is exceptionable to me, in giving a handle to say, that congress have endeavored to administer an opiate, by an alteration, which is merely plausible.[36]

Governor Randolph's concerns illustrated how the Ninth was *not* intended to refer to individual rights as Barnett insisted. Rather, the Ninth Amendment was born from Virginia's wish to protect its power.

Lash next examined the Virginia Senate's report on the Bill of Rights, which concluded that the new version of the Ninth Amendment had not been proposed by Virginia or another state. Dominated by Anti-Federalists wishing to stall ratification and call for another

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[33] Ibid, 334-335.
[34] Ibid, 371-374.
[35] Ibid, 374.
[36] Ibid, 377-378.

constitutional convention, the Senate prevented ratification for two years.[37] This delay ended only after Madison discussed the Ninth Amendment in a famous speech before the House of Representatives. This speech was previously misinterpreted in Ninth Amendment scholarship.[38]

Lash's presentation of James Madison's Speech on the Constitutionality of the Bank of the United States validated the federalist history of the Ninth Amendment presented in his article. The speech's significance was obvious: the writer of the Ninth Amendment illustrated how it should be used in a constitutional debate when state legislatures were still deciding whether to ratify it. Obviously, this would shed important light on the amendment's original meaning. If Madison used it in an argument to protect individual rights, Randy Barnett's libertarian ("powers-constraint") conception would be corroborated. On the other hand, if Madison used the Ninth Amendment to protect state power, Lash's portrayal of the amendment's history would gain even more support.[39]

Lash began by recounting the events preceding Madison's speech: Alexander Hamilton asked Congress to charter the Bank of the United States, the Senate agreed, and the matter was debated in the House. Supporters argued that the Bank was "necessary and proper" for advancing the enumerated federal powers to tax and regulate commerce. Opponents (including Madison) argued that Congress could be authorized to charter the Bank only by construing the Constitution, and especially the "necessary and proper clause," expansively.[40]

Madison began by invoking the Tenth Amendment, arguing that the right to charter a bank was not expressly enumerated in the Constitution, so states retained it. He then discussed the Ninth Amendment. In the final section of his speech, he reminded the House that Federalists

[37] Ibid, 334.
[38] Ibid, 383-384.
[39] Ibid, 384.
[40] Ibid, 384-386.

objected to a declaration of rights because it would "extend federal power by remote implications." State ratifying conventions expressed this fear and asked for amendments guaranteeing that the Constitution would not be interpreted to give "additional powers to those enumerated." Madison then concluded:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with [the state proposals]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. *He read several of the articles proposed, remarking particularly on the 11th and 12th. [T]he former, as guarding against a latitude of interpretation – the latter, as excluding every source of power not within the constitution itself* [emphasis mine]. In fine, if the power were in the constitution, the immediate exercise of it cannot be essential – if not there, the exercise of it involves the guilt of usurpation, and establishes a precedent of interpretation, leveling all barriers which limit the powers of the general government, and protect those state governments.[41]

Lash believed Madison's conclusion was a direct application of the principle of federalism found in the Ninth and Tenth amendments. Because the power to charter banks was not in the Constitution, by the letter of the 12th article, it was reserved to the states. Moreover, the 11th article prohibited Congress from *interpreting* its power to do whatever was "necessary and proper" to regulate interstate commerce in a way that infringed on state powers. Though Madison spoke of the "11th" and "12th" articles, their connection to the Ninth and Tenth Amendments was obvious, as their rule of construction was identical to that preserved by the Ninth and Tenth. Moreover, history supports such a connection. Twelve amendments were initially sent to states for ratification, but the first two were not passed. Therefore, when Madison was speaking, the Ninth and Tenth Amendments were called the "Eleventh" and "Twelfth!"[42]

As Lash noted, Madison never argued that chartering a bank violates an individual right. According to Barnett, Madison said the Bank violated "the equal rights of every citizen"

[41] Ibid, 391-392.
[42] Ibid, 422-423.

(individual rights). Yet Lash noted that Madison only mentioned these equal rights to establish the importance of the right to charter a Bank. Instead, Madison expressly stated that the Bank would "directly interfere with the rights of the States."[43]

The Bank Speech showed that Madison viewed the final language of his Ninth and Tenth Amendments as preservations of state power, despite the Ninth's change from "powers" to "rights." Soon after the speech, Anti-Federalist objections disappeared, and the Constitution was ratified soon thereafter. Perhaps Virginians saw that the new language of the Ninth Amendment still functioned as they wished after all.[44]

Lash believed Barnett missed the scope of the Ninth Amendment. It was not intended to protect *merely* natural or individual rights, but rather *all* rights retained after powers were given to the federal government. These rights included the rights of states to regulate their local affairs. The rights of the people *were* the rights of their states to govern as they saw fit, according to accepted principles of popular sovereignty.[45] "The people" protected their rights by electing representatives to their respective legislatures.

Responding to the potential challenge that his interpretation of the Ninth Amendment ignored the Founders' commitment to natural rights, Lash insisted that his interpretation still protected those rights. He argued that they were retained by the states – not individuals. Thus, the peoples' rights were protected from federal control, but not from state regulation. For example, states continued to establish religion long after the adoption of the First Amendment's "Establishment Clause."[46]

[43] Ibid, 386-390.
[44] Ibid, 393.
[45] Ibid, 399.
[46] Ibid, 401-402.

Therefore, the Ninth Amendment placed the protection of the peoples' natural rights under control of the state. To support this assertion, Lash examined early Ninth Amendment jurisprudence. Justice Chase's opinion in *Calder v. Bull*, for example, cited both the Tenth's principle of limited powers, and the Ninth's rule of construction:

> It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States.
> […]
> All the powers delegated to the people of the United States to the federal government are defined, and no *constructive* powers can be exercised by it.[47]

Lash found similar evidence backing his claim in *Fletcher v. Peck*, and *Society for the Propagation of the Gospel v. Wheeler*. All three were previously regarded as strong evidence that the courts protected natural rights. Now, with a new view of the Ninth Amendment's rule of construction, state law seemed to guard natural rights.[48]

Finally, Lash examined the changing relationship between the Ninth and Tenth Amendments. Madison's Report of 1800, which criticized the Alien and Sedition Acts, relied on the Tenth Amendment to argue that the Acts infringed on state power. Because Congress based its authority to pass the Acts on common law rather than enumerated power, it infringed on retained rights of the states. Madison invoked the Tenth Amendment instead of the Ninth, as no "latitudinous construction" of the Constitution was being used to expand federal power. Because Madison's report became widely publicized and admired, his "rule of construction" involving the Tenth soon overshadowed that of the Ninth, eventually merging the two into a single guardian of federalism.[49] By the time John Marshall issued his opinion in *McCulloch v. Maryland* (1819), the rule of construction preserved in the Ninth Amendment had been swamped by that of the

[47] Ibid, 403.
[48] Ibid, 403-410.
[49] Ibid, 410-414.

Tenth. The issue in *McCulloch* was familiar: Congress wished to establish a Second Bank of the United States, and critics believed this infringed on the rights of the states. Marshall disagreed. He examined the Tenth Amendment, concluding that it did not restrict Congress's power to charter a bank. According to Lash, he was correct. What Marshall missed was the Ninth Amendment's rule against expansive constructions of the Constitution.[50] Decades earlier, James Madison had invoked the Ninth Amendment to challenge such a bank charter.

Lash presented yet another piece of evidence that corroborated his federalist account of the Ninth Amendment. In objecting to Marshall's *McCulloch* opinion, John Taylor argued:

> The eleventh amendment prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged;* and the twelfth reserves *to the states respectively or to the people* the powers not delegated to the *United States*, nor prohibited *to the states.*[51]

Again, another prominent politician viewed the "eleventh" (Ninth) Amendment as a rule of construction protecting the retained rights of the people. Not surprisingly, it was used in conjunction with the "twelfth" (Tenth) to criticize a broad interpretation of the Constitution: John Marshall's endorsement of a bank charter.

Concluding, Lash argued that major works on the Ninth Amendment's history misinterpreted and omitted important evidence. Much of this confusion resulted from the initial practice of calling the Ninth and Tenth Amendments the "eleventh" and "twelfth." Furthermore, historians long accepted Randy Barnett's assumptions that the Ninth Amendment referred to individual rights, so they did not look closely at passages referring to state *power*. Such passages were assumed to refer to the Tenth Amendment. Barnett's distinction between "rights" and "powers" unfortunately obscured much of the Ninth Amendment's history.[52]

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[50] Ibid, 414-417.
[51] Ibid, 417.
[52] Ibid, 422-428.

Through the "Lost Original Meaning," Lash shed important light on the history of the Ninth Amendment. Moreover, he refuted Barnett's claim that the "rights-powers" conception was flawed because it left the Ninth without a function. Now, new evidence seemed to indicate that the "rights-powers" conception was correct. The Ninth *was* intended to establish the boundary between federal and state power. The difference between Barnett's "rights-powers" conception and Lash's interpretation was that Lash infused the "rights-powers" conception of the Ninth with an *active* approach. The Ninth Amendment was not intended to be a functionless "truism." Instead, it was meant to protect state power.

2. "The Lost Jurisprudence of the Ninth Amendment"

Lash's work did not end with "The Lost Original Meaning." Two months later, he published a second article in *Texas Law Review,* which devoted over a hundred pages to recovering court cases relevant to the Ninth Amendment. "The Lost Jurisprudence of the Ninth Amendment" traced the legal use of the Ninth Amendment from adoption through the Civil War and the New Deal. Like his first article, Lash's second was significant for Ninth Amendment history, as it debunked the common assumption that the Ninth Amendment had rarely been discussed in court. Moreover, the jurisprudential evidence further supported Lash's federalist history of the Ninth Amendment.

Lash began by examining early cases in which the Ninth Amendment was used to establish powers retained by the states.[53] For example, in 1816, Judge Grimke noted that South Carolina retained the power to punish people passing counterfeit coins:

> [It does not appear that the power of punishing persons for passing counterfeit coin […] was either expressly given to the Congress of the United States, or divested out of the individual States. *Now the 9th section of the amendments to the constitution […] declares that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people* [emphasis mine]; and in the 10th section of the same, it is further provided, that the powers not delegated to the

[53] Lash, "The Lost Jurisprudence of the Ninth Amendment," 606-613.

> United States by the constitution, nor prohibited by it to the State, are reserved to the States, respectively, or to the people. […] The individual States were in possession of this power before the ratification of the constitution of the United States; and if there is no express declaration in that instrument, which deprives them of it, they must still retain it, *unless they should be divested thereof by construction of implication* [emphasis mine].[54]

Early Ninth Amendment cases always referred to the Ninth Amendment as a rule of construction protecting state power from federal expansion. Thus, they supported Lash's interpretation of the Ninth Amendment.

After discussing these early cases, Lash explained the significance of *Houston v. Moore* (1819). Justice Joseph Story's dissent in *Houston* marks the earliest known mention of the Ninth Amendment in a Supreme Court decision, and it was influential in legal circles for over a century. The importance of Story's mention of the Ninth was obscured, however, because he referred to it as the "eleventh amendment." This was reminiscent of Madison's use of the "eleventh" in his Bank Speech.[55]

Story argued that states retained powers not expressly delegated to Congress:

> […] the powers so granted [in the Constitution] are never exclusive of similar powers existing in the states, unless where the constitution has expressly […] given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. […] In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, *not only upon the letter and spirit of the eleventh amendment of the constitution*, but upon the soundest principles of general reasoning.[56]

As Lash noted, Story's use of the "eleventh amendment" was inconsistent with the meaning of the *real* Eleventh Amendment, which protects the legal immunity of states. Furthermore, Story did not mention natural or individual rights. Rather, he established the "eleventh amendment" as a rule of construction preserving concurrent powers of the states and protecting their autonomy.

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[54] Ibid, 610-611.
[55] Ibid, 613-615.
[56] Ibid, 617.

This was consistent with Lash's model of the Ninth Amendment and Madison's use of "the eleventh amendment" in his Bank Speech.[57]

Lash demonstrated that Story's *Houston* dissent was influential for later jurisprudence. For example, after considering many citations of the "eleventh" amendment and Story's dissent in *Houston*, Justice John Marshall denied in *Gibbons v. Ogden* (1824) that there was any provision in the Constitution restricting the interpretation of enumerated power.[58] Marshall already made this denial five years before in *McCulloch.*[59] In *Gibbons*, the "eleventh amendment" was again seen as a potential protection of state autonomy. Lash included other examples in which Story's reference to the Ninth Amendment in *Houston* was cited to protect state power: in *New York v. Milne*, Justice Thompson quoted Story's reference to the "eleventh" amendment while arguing that a New York statute requiring captains to provide lists of passengers was not a commerce regulation belonging exclusively to the federal government.[60] In *Prigg v. Pennsylvania*, two justices quoted Story's argument while arguing that Pennsylvania retained the power to regulate fugitive slave policy after the enactment of the federal Fugitive Slave Law.[61] Seven years later, Justice Daniel included Story's entire argument in his dissent in *Smith v. Turner*, arguing that federal commerce power was not exclusive of the states.[62] Each of these cases was concerned with the proper scope of state power, rather than the protection of individual rights.

Eventually, Story's support of an active Ninth Amendment waned. His growing tendency to deny restrictions on enumerated power was the result of John Marshall's enormous

[57] Ibid, 618-621.
[58] Ibid, 621-623.
[59] See This Paper, note 47.
[60] Ibid, 625-626.
[61] Ibid, 626-628.
[62] Ibid, 628-629.

influence on the antebellum legal environment. Story increasingly read the Ninth Amendment as a passive rule of construction, rather than an active limitation on federal power.[63] Thus, judicial interpretation transformed the Ninth Amendment's rule of construction into a passive declaration of federalism.

As the nation inched toward civil war, however, the Ninth Amendment gained renewed prominence in arguments for states' rights. Lash examined Ninth Amendment jurisprudence in the Civil War era. In *Anderson v. Baker* (1865), the Maryland Supreme Court declared:

> Prohibitions on the States, are not to be enlarged by construction. To do so, would violate the spirit and object of the 9th and 10th amendments to the Constitution of the United States.[64]

This opinion, issued 70 years after the Ninth Amendment was ratified, shows how it was still used with the Tenth long after Madison discussed it in his Bank Speech. Citing *Stunt v. The Steamboat Ohio, Anderson v. Poindexter, Mitchell v. Wells,* and *Willis v. Jolliffee,* Lash demonstrated how the Ninth Amendment was used extensively to entrench states' rights in the antebellum era.[65] Even the famous *Dred Scott v. Sandford* decision held that:

> The ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States […].[66]

Despite the Ninth Amendment's prior transformation into a passive declaration, it was used repeatedly throughout the 1850s and 1860s as a protection of state power. It was not used to protect individual rights.

Lash followed his examination of the pre-war period with a discussion of how the Fourteenth Amendment affected the Ninth in the post-war era. The Fourteenth Amendment was enacted to protect African Americans' rights from racist legislatures. Because the Fourteenth

[63] Ibid, 630-637.
[64] Ibid, 638.
[65] Ibid, 639-642.
[66] Ibid, 642.

Amendment altered the relation between state and federal power, forcing states to respect the "privileges or immunities" of all United States citizens, it affected the Ninth from the start.

Modern libertarian scholars, Lash noted, argue that the Fourteenth Amendment reduced state control over the Bill of Rights and changed the first set of amendments into individual rights for every citizen. If the Ninth Amendment was "incorporated" into the "privileges and immunities" of the Fourteenth, perhaps it was given a new meaning, protecting "other rights" from the states.[67] Yet Lash denied incorporation of the Ninth. He argued that scholars have never believed the *Tenth Amendment* was incorporated. Because it protects state power from federal interference, using it to restrict that power seems impossible. With a new view of the Ninth Amendment connected to the Tenth, it also makes little sense to incorporate the Ninth. In addition, debates over secession often cited the Ninth Amendment as a justification of state sovereignty, but abolitionists never attempted to use it as a source of individual, natural rights. Therefore, when the Fourteenth Amendment was passed, the Ninth Amendment was often distinguished from the first eight when discussing which rights would be incorporated.[68] In the end, the Fourteenth Amendment did not change the Ninth Amendment into a protection *against*, rather than *of*, state power.

In the remainder of his article, Lash examined the evolution of Ninth Amendment jurisprudence after the Civil War. In the *Legal Tender Cases*, it endured as a rule of construction limiting federal power. Ultimately, the majority in these cases decided to push for a broader rule of construction favoring the federal government, reminiscent of *McCulloch.*[69] The Supreme

[67] Ibid, 643-646.
[68] Ibid, 643-652.
[69] Ibid, 653-658.

Court returned to embracing federalism and preserving states rights only two years later in the *Slaughterhouse Cases*.[70]

The last decades preceding the New Deal saw the Ninth Amendment repeatedly cited as a rule of construction protecting state power. Increasingly, however, courts only used the Tenth. Like in his first article, Lash attributed this change to the popularity of Madison's Report of 1800. As Madison's original arguments distinguishing the Ninth and Tenth Amendments faded into history, courts confused their meanings and combined them into a single rule of construction attributed to the more popular Tenth Amendment.[71] A few cases did discuss the Ninth Amendment as a source of unenumerated, individual rights for the first time.[72] Nevertheless, most cases in that era interpreted the Ninth as a protection of state and local power.[73]

According to Lash, the New Deal dramatically altered the meaning of the Ninth Amendment. Prior to 1937, a rich body of jurisprudence yielded a clear picture of the Ninth Amendment as a rule of construction designed to work with the Tenth. Yet President Roosevelt's New Deal inevitably conflicted with the Ninth Amendment, because it expanded federal power to an unprecedented level. Lash explained that with a single exception, all federal cases discussing the Ninth Amendment between 1930 and 1936 focused on the constitutionality of federal expansion. Furthermore, they almost invariably linked the Ninth Amendment with the Tenth to preserve self-government.[74] Thus, the Supreme Court ruled in *A.L.A. Schechter Poultry Corp v. United States, Carter v. Carter Coal Co.,* and *United States v. Butler* that the Ninth and

[70] Ibid, 658-661.
[71] Ibid, 669-73.
[72] Ibid, 674-675.
[73] Ibid, 675-679.
[74] Ibid, 679-684.

Tenth Amendments protected states from attempts to expand the federal government based on the rights to regulate interstate and intrastate commerce.[75]

President Roosevelt's 1936 election, however, changed constitutional interpretation. Like other shifts in the Court's philosophy, interpretations of the Ninth and Tenth Amendments shifted in favor of the federal government.[76] In *Charles C. Steward Machine Co. v. Davis,* the Court denied that the Social Security Act violated the Tenth Amendment, and it ignored Ninth Amendment concerns raised in a lower court.[77] In *Tennessee Electric Power Co. v. Tennessee Valley Authority,* it ruled that the federal government's sale of electricity in a local market did not violate the rights of states under the Ninth and Tenth Amendments.[78] In *United States v. Darby,* the Court upheld federal regulation of purely intrastate commerce in cases in which Congress felt that it affected interstate commerce. Justice Harlan Stone wrote:

> Our conclusion is unaffected by the Tenth Amendment. [...] The Amendment states *but a truism* [emphasis mine] that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.[79]

Lash argued that Justice Stone was correct in this interpretation. The *Ninth* Amendment limited broad rules of construction and made the Tenth more than a mere "declaratory relationship between the national and state governments." Like Justices Marshall and Story before him, Justice Stone endorsed a broad rule of construction permitting expanded federal power by

[75] Ibid, 684-688.
[76] Ibid, 689.
[77] Ibid, 690.
[78] Ibid, 691.
[79] Ibid, 692.

ignoring the Ninth Amendment.[80] By 1941, the Court had concluded in *Wickard v. Filburn* that federal power could be expanded to wherever it was not prohibited by an enumerated limitation in the Constitution.[81] This violated the principle Madison wished to protect when he proposed the Ninth and Tenth Amendments.

Soon thereafter, the Ninth Amendment began to be viewed as a "mere truism." In *United Public Workers of America (C.I.O.) v. Mitchell*, the Supreme Court held:

> If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[82]

This view of the Ninth was restated in *United States v. Painters Local Union No. 481*.[83] Thus, the New Deal transformed the Ninth Amendment from an active rule of construction into a "mere truism" marking the line between federal and state power. With this new development, Randy Barnett's passive "rights-powers" conception was born.

Lash's examination of the New Deal showed that courts were endorsing Barnett's "rights-powers" conception into the middle of the twentieth century. Instead of protecting individual rights, the Ninth Amendment still affected the relationship between federal expansion and local power. Therefore, the Ninth Amendment's "rights of the people" were still viewed as state powers after the Great Depression. Powers not delegated were rights retained by the states.

When Bennett Patterson published *The Forgotten Ninth Amendment* in 1955, he concluded:

> [t]here has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America [...] [there] are a number of cases which briefly mention the Ninth Amendment by grouping it with the Tenth Amendment. [...] these cases must have really been about the Tenth and not the Ninth because they involved the construction of federal power, not the protection of individual rights.[84]

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[80] Ibid.
[81] Ibid, 693.
[82] Ibid, 696.
[83] Ibid, 697.
[84] Ibid 708-709.

This assertion is remarkable because Patterson missed over one hundred years of Ninth Amendment jurisprudence. After the Ninth became a "truism," it was now completely misinterpreted. Because Patterson assumed the Ninth Amendment involved individual rights, and he could not find recent precedent demonstrating how the Ninth was independent of the Tenth, he lost sight of its original meaning. Randy Barnett echoed Patterson's conclusion thirty years later, arguing that if the Ninth Amendment were really about state power, it would be a functionless "truism" identical to the Tenth. Though the Ninth Amendment was originally designed to work with the Tenth, its universal pairing with the Tenth eroded its identity.

Lash concluded by examining the Ninth Amendment's evolution after the New Deal era. In *Griswold v. Connecticut,* Justice Goldberg cited Patterson's book and declared:

> The Court has had little occasion to interpret the Ninth Amendment. [...] [A]s far as I am aware, until today this Court has referred to the Ninth Amendment only in [...] *United Public Workers v. Mitchell, Tennessee Electric Power Co. v. TVA,* an *Ashwander v. TVA.*[85]
> […]
> The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language.[86]

As Lash noted, Goldberg was accurate on none of these points.[87] Somehow, a justice of the Supreme Court had adopted a vastly incorrect picture of the amendment's history. In his dissent, Justice Potter Stewart argued that the Ninth Amendment was intended to add emphasis to the Tenth's protection of reserved state powers. This was the passive view of the Ninth that emerged from the New Deal era.[88] Justice Hugo Black criticized both of these views of the Ninth Amendment, arguing that:

> "[...] every student of history knows [that the Ninth Amendment's purpose was] to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. [...] [F]or a period of a century and a half no serious

[85] Ibid, 709-710.
[86] Ibid, 710.
[87] Ibid.
[88] Ibid.

> suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.[89]

Justice Black's opinion is consistent with Lash's model of the Ninth Amendment. Moreover, Lash's work showed that Justice Black was correct: the Framers did not intend for the Ninth Amendment to be applied against the states.

By tracing the judicial history of the Ninth Amendment, "The Lost Jurisprudence" closed the large historical gaps between the amendment's ratification and Randy Barnett's work of the 1980s. The significance of Lash's articles was undeniable: they demonstrated persuasively that the Ninth Amendment was *not* an "inkblot," forgotten by history and without a meaning. In fact, it was the result of complicated objections to the Bill of Rights, and courts defended its rule of construction for over one hundred and fifty years. Only after the New Deal did the Ninth Amendment complete its transformation into a "truism" that merely emphasized the Tenth.

Lash's *Texas Law Review* articles had many important implications for the Ninth Amendment debate. First, they provided strong support for the "rights-powers" model that Barnett rejected a decade earlier. Lash showed that from inception, scholars, lawyers, and judges believed the Ninth Amendment established the proper boundary between federal and state power. By contrast, Lash illustrated the lack of examples in which the Ninth Amendment was invoked for individual rights. Overwhelming evidence indicated that the Ninth was almost exclusively mentioned in discussions concerning state power.

In his early work, Barnett objected to a federalist view of the Ninth Amendment both because it rendered the Ninth a mere restatement of the Tenth and because it ignored the Ninth's original purpose: to ensure that enumerating certain rights did not endanger natural rights unmentioned in the Constitution. Lash addressed both of Barnett's objections. By showing how

[89] Ibid, 711-713.

the Ninth was intended to work in conjunction with the Tenth, he demonstrated how Barnett's "rights-powers" model did not entail a functionless Ninth Amendment. The key to avoiding Barnett's objection was Lash's characterization of the Ninth as an "active" rather than a "passive" rule of construction. The Ninth Amendment was ratified to protect the rights of states to govern themselves, rather than to be a truism. Lash also compared the overwhelming evidence for his view with the lack of proof that the Ninth had any relation to individual rights. Thus, he showed that the "rights-powers" conception was more accurate than the "powers-constraint" alternative. In challenging Barnett, Kurt Lash reopened the debate over the Ninth Amendment's original meaning.

D. Randy Barnett's Reply

Less than a year later, Randy Barnett replied with "The Ninth Amendment: It Means What it Says."[90] Barnett attempted to "synthesize the developing modern scholarly debate about the original meaning of the Ninth Amendment [...]"[91] by presenting five separate models of how scholars had interpreted the Ninth Amendment. Barnett examined historical evidence to determine whether it supported or weakened each model. This method of analysis marked an empirical approach to the debate, which he hoped would forge an academic consensus on the Ninth Amendment's original meaning. Barnett believed history supported more than one model, and he argued that they were not exclusive. Ultimately, Barnett's conclusion was a compromise with Lash's work.

Barnett's five models represented the work of previous Ninth Amendment scholars. For example, Russel Caplan first articulated the "state-law rights" model in 1983.[92] Caplan believed

[90] Randy Barnett, "The Ninth Amendment: It Means What it Says," *Texas Law Review,* Vol. 85, No. 1, 2006.
[91] Ibid, 2.
[92] Ibid.

the 'other rights' to which the Ninth Amendment refers were state constitutional and common law rights." Therefore, the Ninth Amendment was merely intended to establish the existence of states' rights, and states had the right to amend them as they saw fit. Also, because the federal government was granted the power to affect these rights under the Supremacy Clause, altering them could never violate the Ninth Amendment.[93]

Thomas McAffee, another Ninth Amendment scholar, first advocated the "residual rights" model in 1990. According to McAffee, the Ninth was intended to prevent the argument that enumerating rights in the Constitution implies that Congress has broader powers than those expressly delegated.[94] McAffee's model is similar to Lash's interpretation. Both scholars argue that the Ninth Amendment's primary goal was to prevent an improper construction that expanded the federal government's powers. McAffee concluded that the "rights retained by the people" were defined "residually" from the powers granted to the federal government. In other words, McAffee interpreted the Ninth Amendment similarly to the "rights-powers" model of the 1980s. The rights of the people are those powers not delegated to the government.

Unlike Lash, however, both Caplan and McAffee endorsed "passive" models of the Ninth Amendment. This distinction made both their models implausible. Barnett concluded that the Ninth Amendment was intended to be *actively* construed and enforced.[95] Therefore, because the Ninth Amendment was more than declaratory, Caplan and McAffee's models were undercut.

Barnett accepted Lash's conclusion that the Ninth Amendment was intended to be a rule of construction limiting expansion of federal power. Nevertheless, he wished to show that it was created to protect individual, natural rights. As Barnett noted, Lash sometimes implied this was

[93] Ibid, 10.
[94] Ibid, 10-12.
[95] Ibid, 47, 55, 58. Barnett also briefly makes this assertion while evaluating a number of other pieces of evidence, such as Madison's Whiskey Rebellion Speech (pp. 65).

possible and other times denied it.[96] Therefore, the crucial point of contention lay in the original scope of the Ninth Amendment. Was it intended to protect individual or collective rights?

Barnett divided these positions into separate "models." The "individual rights" model, which he endorsed, held that "the Ninth Amendment was meant to preserve 'other' individual natural rights that were 'retained by the people' when forming a government but which were not included in 'the enumeration of certain rights.'" These rights were protected from the federal government, not from the states. Only after the enactment of the Fourteenth Amendment (and the incorporation of the Bill of Rights) were natural rights protected from the states.[97] In supporting this model, Barnett was consistent with his prior work: the Ninth Amendment was intended to provide an active check on federal expansion that infringed on natural rights of the people.

Barnett contrasted this model with the "collective rights" model, which he attributed to Akhil Amar and Kurt Lash. This model held that "the 'other' rights retained by the people is a reference to the rights that the people possess as a collective political body, as distinct from the rights they possess as individuals."[98] In Lash's case, this implied that the Ninth Amendment protected the rights of the people composing various *states*. Therefore, Lash endorsed a specific "collective rights" interpretation, which Barnett called the "federalism" model.

Barnett believed the "individual rights" and "collective rights" models were not mutually exclusive. The Ninth Amendment could have protected both natural rights *and* the rights of states. Therefore, according to Barnett, Lash conceded the plausibility of the "individual rights" model along with his state powers interpretation when he admitted that the Ninth could protect individual rights. Barnett examined whether each of these models was supported by evidence in

[96] Ibid, 64.
[97] Ibid, 12-15.

his empirical study and concluded that the "individual rights" model was far more plausible than "collective rights" models, though "collective rights" models enjoyed some support.

Barnett offered a number of different sources to corroborate his "individual rights" model. He demonstrated that the major motivation behind the Bill of Rights was the protection of natural rights from the federal government. For example, Barnett examined the Federalist fear that enumerating certain rights would leave others unprotected and connected it with the Ninth Amendment through the Sedgwick-Benson Exchange and Roger Sherman's Draft Bill of Rights.[99] Because this concern led to the creation of the Ninth Amendment, Barnett contended that the amendment must have some relation to natural rights.

Barnett disagreed with Lash's account of the state conventions' amendment proposals. Previously, Lash traced the evolution of these proposals, suggesting that they constituted precursors to the Ninth Amendment. Moreover, he argued that each proposal contained both a rule of construction that became the Ninth Amendment and a statement of federalism that became the Tenth.[100] Barnett showed that the proposals differed in a number of respects. Only Virginia and North Carolina proposed amendments reserving rights to the "states." Instead, New York's mentioned "The *people* of the several states," while other proposals reserved "powers" instead of rights, and some omitted rules of construction entirely.[101] When Madison finally created a draft of the Ninth Amendment, it preserved only "retained rights by the people." According to Barnett, Madison had various versions at his disposal and purposefully chose one

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[98] Ibid, 15.
[99] Ibid, 23-41.
[100] "The Lost Original Meaning of the Ninth Amendment," 398.
[101] "The Ninth Amendment: It Means What it Says," 45-46.

referring to "rights" (not powers) of the "people" (not states). Therefore, Madison ensured that the Ninth Amendment endured as a protection of the peoples' individual rights.[102]

Barnett also disagreed with Lash's view of the ensuing debate in the Virginia Senate. Previously, Lash examined the Virginia Senate's objection that the new version of the Ninth Amendment had not been proposed by any of the states. He implied that this showed the original purpose of the Ninth Amendment was to preserve state powers and that some felt the revised language was an ambiguous reference to the state proposals.[103] Barnett went further than Lash, arguing that the new Ninth Amendment was not ambiguous, but rather a purposeful *change in meaning* from a preservation of state power to a protection of individual rights.[104]

Barnett then turned to James Madison and Hardin Burnley's reactions to these objections in the Virginia Senate. According to Burnley:

> [...] by preventing an extension of power in that body from which danger is apprehended safety will be insured if its powers are not too extensive already, & so by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.[105]

Madison agreed:

> If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.[106]

Lash argued in "The Lost Original Meaning" that because Madison and Burnley felt retaining rights amounted to restricting power, they believed the alterations of the Ninth Amendment's language did not change its meaning. The amendment was still the rule of construction Virginia proposed two years earlier.[107]

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[102] Ibid, 46.
[103] "The Lost Original Meaning of the Ninth Amendment," 371-378.
[104] The Ninth Amendment: It Means What it Says, 47-52.
[105] "The Lost Original Meaning of the Ninth Amendment," 373.
[106] Ibid, 374.
[107] "The Lost Original Meaning of the Ninth Amendment," 374.

Interestingly, Barnett had discussed Madison and Burnley's correspondence before. In the 1980s, he argued that the "rights-powers" conception wrongly implied that their opinions showed "rights retained" amounting to "reserved powers."[108] Now replying to Lash, Barnett resurrected that argument to show that their opinions were consistent with his "individual rights" model. They believed in two ways of protecting natural rights: retaining rights (through the Ninth Amendment) and restricting powers (through the Tenth). Therefore, when discussing the line between retaining rights and reserving powers, Madison and Burnley were actually discussing how the Ninth and Tenth Amendments worked together to limit federal power. The Ninth Amendment did so by guaranteeing protection of unenumerated, individual rights.[109]

Barnett agreed with Lash that the Bank Speech proved the Ninth Amendment was originally an active rule of construction. He disagreed, however, with Lash's view that it does not support the protection of individual rights. Citing Lash's denial that Madison's reference to a monopoly's effects on the "equal rights" of citizens had anything to do with his constitutional argument, Barnett showed that Madison included his discussion of the Bank's effects in the section concerning the constitutionality of the Bank.[110] Madison objected to the Bank because it represented an improper interpretation of Congressional power affecting the *individual* rights of citizens. Barnett acknowledged the possibility that Madison believed a bank would violate the collective rights of states as well. According to Barnett:

> Madison is arguing here against a latitudinarian interpretation of various enumerated powers. There is no question but that an overly broad interpretation of enumerated powers can interfere with both the reserved political powers of the states, as well as violate the individual rights retained by the people.[111]

Nevertheless, the Bank Speech did not seem to refute Barnett's "individual rights" model, as

[108] "Reconceiving the Ninth Amendment," 15-16.
[109] "The Ninth Amendment: It Means What it Says," 54-56.
[110] Ibid, 60-61.
[111] Ibid, 62.

Lash contended.

The main disagreement between Barnett and Lash lay in the *scope* of rights protected by the Ninth Amendment. Though they both agreed that it was originally an active rule of construction preventing expansion of the federal government, they disagreed on *what exactly* the Ninth Amendment protected from this expansion. Endorsing the "individual rights" model, Barnett believed the Ninth Amendment was born out of fears that individual rights would be "disparaged," and a number of important historical sources seemed to corroborate his account. He adopted a cautionary posture toward Lash, however, saying that if Lash believed the Ninth protected only the collective powers of states, then he was incorrect. If Lash conceded that the Ninth was intended to protect, at least in part, natural rights of individual citizens, Barnett was willing to agree with him.[112]

Interestingly, Barnett conceded that the Ninth Amendment later became a rule of construction preserving states' rights. His entire discussion of "The Lost Jurisprudence," however, was confined to one page and a footnote, in which he explained that the rise of Calhounian states' rights philosophy had a profound effect on the amendment. Because the states' rights issue was such a prominent debate in the early 19th century, relying upon case law and constitutional arguments from that period could lead to a skewed impression of the Ninth Amendment's *original* meaning. Therefore, Lash's entire second article, though interesting, was irrelevant in determining the original purpose of the Ninth Amendment.[113]

In the end, Barnett's reply was a compromise with rather than a rejection of Lash's work. A decade earlier, Barnett objected to interpreting "retained rights" as "reserved powers" (the "rights-powers" conception) because such an interpretation made the Ninth Amendment a

[112] Ibid, 80.
[113] Ibid, 80-81.

passive declaratory statement. Now he defended the individual rights model on similar grounds. Retaining rights was never equivalent to reserving powers. Instead, they were distinct methods of checking expansion of the federal government. Barnett agreed with Lash that the Ninth Amendment's goal was prevention of expanded federal power. The Ninth was not, however, *only* enacted to guard the collective powers of states, as Lash believed. Rather, Madison meant to protect natural rights. A wealth of evidence seemed to support this claim. Thus, Barnett's new "individual rights" model was a revamped version of his "powers-constraint" conception from the past. His position remained unchanged: the Ninth Amendment was libertarian, and it provided for the protection of individual rights unmentioned in the Constitution.

E. The Triumph of the "Federalism" Model

In December of 2006, Kurt Lash addressed Barnett's analysis. His final article, "The Inescapable Federalism of the Ninth Amendment,"[114] was a scathing criticism of Barnett's reply. After refuting much of "The Ninth Amendment: It Means What it Says," Lash produced additional evidence supporting his "federalism" model.

The important distinction between Barnett and Lash lay in what rights they felt were "retained by the people." Lash believed these rights were broader in scope than Barnett allowed. In painting the Ninth Amendment as a response to fears that natural rights were endangered, Lash felt Barnett ignored an important element of the amendment's history. The Ninth Amendment was intended to protect natural rights, but not in the way Barnett had argued. For years, Barnett had offered a version of the Ninth Amendment as a libertarian protection of the peoples' individual rights. Individual rights were distinct from collective rights, though perhaps the Ninth protected both.

[114] Kurt Lash, "The Inescapable Federalism of the Ninth Amendment," Loyola-LA Legal Studies Paper No. 2007-3.

Lash conceded that the Ninth Amendment protected both individual and collective rights but went even further: he criticized Barnett's distinction between individual and collective rights. When the Ninth Amendment was ratified, reserving state powers *was* protecting "the peoples'" unenumerated rights. Reserving collective rights of the people in their *states* was widely regarded as the proper means of preserving the peoples' individual rights. Therefore, when the Bill of Rights was drafted, "the people" and "the people of the several states" were synonymous. When the Ninth Amendment protected "retained rights of the people," it was equivalent to reserving the powers of the states![115]

This argument explains a great deal. Because "the people" was conceptually equivalent to "the states," the Ninth Amendment preserved state powers while only referring to "the people." In addition, the language of the Ninth Amendment mirrored that of the Tenth, which reserves powers "to the states respectively, or to the people." Thus, the entire debate over whether protecting "rights retained by the people" is the same as reserving "powers of the states" seems a semantic triviality, as Madison and Burnley insisted. Barnett relied heavily on this distinction – between a libertarian "the people" and a collectivist "the states" – to deny that the evidence only supported a "collective rights" model of the Ninth Amendment. Lash exposed how this misconception led to enormous flaws in Barnett's work.

For example, Barnett had examined the various state amendment proposals and concluded that they were not as similar as Lash suggested. Rather, some contained references to "the *people* of the several states" while others simply referred to "the states." Some proposals never mentioned "rights retained," preferring language related to "powers." According to Barnett, when Madison's final draft only included "rights" retained by "the people," it represented a conscious choice between many versions and ultimately protected individual

[115] Ibid, 20-27.

rights.[116] After demonstrating how individual rights were protected by reserving state power, however, this argument seems spurious. The state proposals were all designed toward the same end, and their semantic differences were insignificant. On the other hand, many states proposed amendments including both a principle of reserved powers (the Tenth Amendment) and a rule of construction prohibiting broad interpretations of enumerated power (the Ninth). The goal of each was to protect the rights of "the people" by preserving self-government in the states.[117]

The Virginia Senate was concerned that the final language of the Ninth Amendment no longer prevented broad constructions that disparaged states' rights. Barnett believed this showed that the House Select Committee purposefully chose a rule of construction different from that which Virginia desired.[118] In response, Lash quoted Virginia Governor Edmund Randolph's complaints with the final version of the Ninth Amendment:

> [It] is exceptionable to me, in giving a handle to say, that congress have administered an opiate, by an alteration, which is merely plausible.[119]

Instead, Randolph preferred "a provision against extending the powers of congress" that would be "more safe, and more consistent with the spirit of [Virginia's] 1st and 17th amendments" (precursors to the Ninth and Tenth Amendments).[120] Virginia was not concerned that the amendment had changed in meaning, but rather that the final draft was an unclear version of its earlier proposals.

Madison's final drafts of the Ninth and Tenth Amendments incorporated these proposals, and he did not feel the change in language reflected a change in meaning. As discussed in Lash's and Barnett's work, both Madison and Burnley believed retaining rights to the people and states was equivalent to withholding powers from the federal government. Barnett argued that

[116] "The Ninth Amendment: It Means What it Says," 45-46.
[117] "The Inescapable Federalism of the Ninth Amendment," 11-18.
[118] "The Ninth Amendment: It Means What it Says," 47-52.

Madison and Burnley were advocating two methods of protecting natural rights: retaining individual rights to the people and reserving unenumerated powers to the states.[121] Lash now disagreed, reminding the reader of the historical context in which Madison and Burnley were writing: they were discussing Edmund Randolph's objection that the final draft of the Ninth Amendment differed from its predecessor. Madison and Burnley believed the old draft referring to "reserved powers" was equivalent to the final draft, which referred to "retained rights by the people." Therefore, Madison, Burnley, and Randolph believed the final draft of the Ninth Amendment proposed a rule of construction protecting state power. It was not, as Barnett argued, an attempt to protect individual rights.[122]

Lash also criticized Barnett's interpretation of Madison's Bank Speech. Barnett argued that because Madison referred to the bank's monopoly in the constitutionality section of his speech, Madison used the Ninth Amendment to protect individual rights.[123] As Lash noted, however,[124] Madison's discussion of monopolies occurred in the context of a larger argument establishing that the power to charter a bank was important, and therefore would have been enumerated had the Framers believed it necessary.[125] His mention of "equal rights" had no connection to "rights" protected by the Ninth Amendment. In fact, Madison never used any part of his Bank Speech to connect the Ninth Amendment to individual rights. By contrast, he repeatedly claimed that the Bank would violate rights of the *states.* Madison repeated the amendment's history and its ties to state conventions' proposals, concluding that the Bank violated its rule of construction and infringed on the autonomy of the states. Barnett never

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[119] "The Inescapable Federalism of the Ninth Amendment," 30.
[120] Ibid.
[121] "The Ninth Amendment: It Means What it Says," 54-56.
[122] "The Inescapable Federalism of the Ninth Amendment," 31-32.
[123] "The Ninth Amendment: It Means What it Says," 60-62.
[124] Lash had already made this argument in a previous article. See Note 39.
[125] "The Inescapable Federalism of the Ninth Amendment," 38-39.

addressed this passage in his empirical study.[126] Therefore, according to Lash, Madison demonstrated through his Bank Speech that the Ninth Amendment preserved state autonomy. This did not mean that the Ninth bore no relation to individual rights, but rather that it protected those rights by guarding state powers.

Ultimately, Barnett's attempts to divorce the Ninth Amendment from its collectivist roots were unconvincing. Because he distinguished between the rights of "the people" as individuals and those of the states, he underestimated ties between the desires of states to preserve their autonomy, their proposed amendments, and changes in the amendment's language. Barnett's interpretation of Madison and Burnley, the Bank Speech, and debates in the Virginia Senate all relied on the assumption that the peoples' rights were different from those of the states. Once this assumption was rejected, his arguments lost credibility.

Lash concluded by questioning Barnett's attack on the "The Lost Jurisprudence." Barnett argued that later historical sources were misleading because of the rise of states' rights philosophy in antebellum America. Therefore, according to Barnett, the amendment's "lost jurisprudence" was irrelevant in determining its *original* meaning.[127] Lash countered that Barnett himself relied on later sources, such as the work of St. George Tucker (1803), state constitutional amendments (1857), and the Constitution of the Confederacy (1861), in his empirical study. Regardless, even if historical evidence were limited to the period before 1820, the evidence still suggested that the Ninth Amendment was intended to protect the rights of states from a growing federal power. [128]

[126] Ibid, 44.
[127] "The Ninth Amendment: It Means What it Says," 80-81.
[128] "The Inescapable Federalism of the Ninth Amendment," 46-47.

F. Reflections on the History of the Modern Debate

Presently, Randy Barnett has not replied to Kurt Lash's newest article. Perhaps he has not had adequate time to prepare a rebuttal. This explanation notwithstanding, Barnett's "individual rights" model of the Ninth Amendment seems rather implausible, given the current trend of the modern debate. With each new article, Kurt Lash's "federalism" model is further supported by historical evidence.

In the 1980s, Barnett's work represented the cutting edge of Ninth Amendment research. He was writing at a time when Judge Bork considered the amendment an "inkblot," with a history and meaning shrouded in mystery. Barnett's libertarian position was so widely regarded that it exerted a strong influence on Ninth Amendment research. By assuming that the amendment referred to individual, natural rights, scholars completely overlooked historical references to it as the "eleventh" amendment. These sources spoke of an "eleventh" amendment involving preservation of state power, so they seemed unrelated to the Ninth Amendment that fit into the accepted libertarian paradigm.[129] Sources that *were* considered were often misinterpreted. Assuming differences between "rights" and "powers" and "the people" and "the states" led to critical misinterpretations of key pieces of evidence.[130] Because Barnett took for granted that the Tenth Amendment was a principle of federalism while the Ninth was a libertarian protection, he overlooked the connection between the Ninth and Tenth Amendments. These assumptions shaped the development of the modern debate.

Randy Barnett began his work with an assumption that "rights" and "powers" were not equivalent. If they were, he contended, the Ninth Amendment would be functionless, because it

[129] "The Lost Jurisprudence of the Ninth Amendment," 618-621.
[130] Lash's discussion of Barnett's errors in the analysis of these sources are evident throughout "The Inescapable Federalism of the Ninth Amendment."

would merely restate the Tenth.[131] Lash refuted this claim at the beginning of his first article by adopting an *active* federalist interpretation of the Ninth Amendment. Barnett's assumptions seem to have fueled his demise, as his refusal to acknowledge the Ninth Amendment's collectivist history led him to an obvious historical error. Though he insisted that concerns with the protection of natural rights led to the adoption of the Ninth Amendment, he did not anticipate Lash's response: agreement. Lash agreed that one motivation behind the Ninth Amendment was the protection of natural rights, but the Framers understood this protection to be the responsibility of the *states.* The states retained the power to regulate many individual rights, such as freedom of religion.[132] Barnett acknowledged this in an earlier article.[133] Therefore, one can only wonder how he overlooked a historical concept so central to federalism itself.

Of course, the assumption that the Ninth Amendment was libertarian in nature preceded Barnett's work. Bennett Patterson argued in 1955 that court cases involving the Ninth Amendment really were about the Tenth, because confusing "rights" with "powers" stripped the Ninth Amendment from any differences contrasting it with the Tenth.[134] Patterson's argument, however, was the product of a long trend in Ninth Amendment jurisprudence of increasingly combining the Ninth and Tenth Amendments' federalist principles into a single amendment (the Tenth).[135] Perhaps Barnett inherited his assumptions from a complex series of historical events. In that case, we are only beginning to grasp the true story of the Ninth Amendment's history.

With each new article, Kurt Lash seems to uncover additional evidence to support a "federalism" model of the Ninth Amendment. History suggests more will emerge as the debate continues. For now, it seems safe to conclude that the Ninth Amendment was intended to

[131] "Reconceiving the Ninth Amendment," 6-7.
[132] "The Inescapable Federalism of the Ninth Amendment," 20-27.
[133] "The Ninth Amendment: It Means What it Says," 12-15.
[134] "The Lost Jurisprudence of the Ninth Amendment," 708-709.

prevent broad interpretations of enumerated powers. The Ninth and Tenth Amendments were born out of states' concerns that their powers were threatened by a growing federal government. The "rights retained by the people" were really powers retained by the states. Therefore, the Ninth Amendment was federalist from the beginning.

G. Applying the "Federalism" Model of the Ninth Amendment

Despite the Ninth Amendment's contentious past, the Supreme Court has cited it repeatedly throughout the past half century as a source of individual rights. Beginning in the 1960s, the Court began to recognize a general right to privacy, relying partially on the "unenumerated rights" of the Ninth Amendment. Moreover, the Court has shown a growing tendency to protect a number of rights unmentioned in the Constitution. A close examination of these rulings, however, reveals that they rely on an anachronistic version of the Ninth Amendment.

Modern Ninth Amendment jurisprudence began with the Supreme Court's decision in *Griswold v. Connecticut* (1965). The Court struck down a Connecticut statute prohibiting physicians from discussing birth control and dispensing related materials to patients. In the majority opinion, Justice Douglas defended "peripheral" rights, which stem from specific provisions in the Constitution:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice […] is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the first Amendment has been construed to include certain of those rights. […] [T]he right to educate one's children as one chooses is made applicable to the State by the force of the First and Fourteenth Amendments. […] [T]he same dignity is given the right to study the German language in a private school. […] Without those peripheral rights the specific rights would be less secure. […] In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.[136]

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[135] Lash traces this trend throughout his second *Texas Law Review* article.

[136] Charles Prince, *The Purpose of the Ninth Amendment to the Constitution of the United States: Protecting Unenumerated Rights* (USA: The Edwin Mellin Press, 2005), 41-42.

Justice Douglas argued that Constitutional provisions must be subject to interpretation, because the Constitution itself is a brief document with general text. For example, the First Amendment's protection of freedom of speech and religion is unintelligible without latitude to interpret that protection in a meaningful way. Thus, "the people" retain various rights supported by the First Amendment but not *specifically* included in it. Justice Douglas then established a right to privacy:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. […] Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers […] without consent of the owner is another facet of that privacy. [The Fourth and Fifth Amendments contain similar penumbras of privacy]. The Ninth Amendment provides: "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[137]

Justice Douglas believed the Ninth Amendment supports a general right to privacy, derived from the "penumbras and emanations" of specific Constitutional guarantees. His reasoning was understandable. The Ninth was intended to prevent certain rights from being disparaged when others were expressly listed in the Constitution. The Ninth Amendment protected peripheral rights, which the Framers never could have envisioned a need to protect.

The validity of penumbral rights lies beyond the scope of this paper. Nevertheless, there does seem to be a significant difference between interpreting clauses already in the Constitution and establishing rights unrelated to Constitutional provisions at all. Some measure of interpretation seems necessary to give text its meaning. Yet as Kurt Lash has demonstrated, the Ninth Amendment was intended to prevent certain broad interpretations of the Constitution. Specifically, the Constitution may not be construed in a manner that disparages the powers of states. Therefore, finding a specific right to privacy of association in the narrow text of the First

[137] Ibid, 42.

Amendment may be justified. The First Amendment was "incorporated" into the Fourteenth Amendment, so "the people's" First Amendment guarantees are protected from the states. Finding a *general* right to privacy in the "unenumerated rights" of the Ninth Amendment, however, would be improper. As we have seen, James Madison intended for the "unenumerated rights" of the Ninth Amendment to refer to the powers of states, not individuals. Therefore, under the original meaning of the Tenth Amendment, because a general right to privacy is not enumerated in the Constitution, it remains within the domain of the states. The Ninth Amendment guarantees that the Constitution may not be construed to deny states these rights. Finding a general right to privacy that all citizens may use against their respective states would violate Madison's "federalist" Ninth Amendment.

A tension seems to exist between plausible interpretations of Constitutional text, and those interpretations that infringe on legitimate state powers. Madison presumably intended for courts to determine the proper line between acceptable and unacceptable Constitutional constructions. Certainly, however, Justice Douglas's argument that the Ninth Amendment itself could be used to prohibit Connecticut from defining its citizens' privacy rights seems historically inaccurate. Ironically, the Ninth Amendment seems to have been intended to protect the states from just the sort of argument Douglas employed!

Historical evidence now suggests that Justice Black was correct in his *Griswold* dissent:

> [The Ninth Amendment] was passed, not to broaden the powers of this Court or any other department of "The General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. […] This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention. […] Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever

> use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.[138]

Madison never intended for the Ninth Amendment to be used against the states, but rather as a state protection against the federal government. A "general right to privacy," protected from state regulation, seems to be the type of natural right Randy Barnett insists is protected under the Ninth Amendment. As we have seen, such an interpretation of the Ninth Amendment is incorrect.

Though the Ninth Amendment itself was not originally a limit on state power, it remains unclear to what extent the Ninth Amendment was intended to protect the states from "latitudinous constructions." Therefore, finding unenumerated rights in the "penumbras and emanations" of specific clauses in the Constitution may or may not violate the original meaning of the Ninth Amendment. Undoubtedly, Madison believed in strict construction of the Ninth Amendment – illustrated through his speech on the Bank of the United States. Madison argued that even an explicitly included provision, such as the "Necessary and Proper Clause," could not be interpreted in a way that threatened the states. Thus, Congress could not charter a bank, though it was given the power to do whatever was necessary and proper to attain a legitimate end. On the other hand, there is a vital difference between the Bank controversy and *Griswold v. Connecticut.* Madison created the Ninth Amendment to protect the states from an expanding federal government. *Griswold* saw state powers restricted by the rights of individual citizens.

Nevertheless, the Ninth Amendment was conceived in an era when the rights of individuals were understood to be the powers of their respective state governments. Legal rights, enforceable against state legislatures, developed after the Civil War and the Fourteenth Amendment. Only in this post-war political climate did a libertarian construction of

[138] Ibid, 46.

unenumerated rights emerge, and it is under this libertarian model that the *Griswold* majority and Randy Barnett endorsed a natural right to privacy. The Ninth Amendment was not *originally* compatible with broad constructions of the Constitution in favor of an individual right to privacy.

Despite its anachronistic reading of the Ninth Amendment, in the following decade, the Supreme Court further developed its view of the Ninth as a source of unenumerated rights. In *Freeman, Giardian v. Flake* (1972), Justice Douglas rejected a state attempt to expel students because of their hair style:

> "I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights."

For Douglas, freedom to choose a hairstyle was an essential, unenumerated right protected by the Ninth Amendment. In a companion case, *Olff v. East Side Union High School* (1972), he argued:

> The word "liberty" is not defined in the Constitution. But, as we held in *Griswold v. Connecticut*, it includes at least the fundamental rights "retained by the people" under the Ninth Amendment. One's hair style, like one's taste for food, or one's liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme – a scheme designed to keep government off the backs of people.[139]

Douglas expanded the newfound right to privacy to include not only freedom of hairstyle, but also the right to certain preferences, such as music, art, etc. Unfortunately for him, historical evidence does not support the Ninth Amendment as constitutional proof for his claim. The original, "federalist" Ninth Amendment preserved the peoples' right to vest in their legislatures the power to regulate these matters as they saw fit. Surely, the Ninth Amendment was not intended to restrict state power from governing local affairs, as Douglas believed!

In *Roe v. Wade* (1973), the Court invalidated Texas's abortion laws by extending the right to privacy to a woman's right to choose. The Ninth Amendment only played a brief role in

[139] Ibid, 50.

the Court's reasoning. After discussing the evolution of the right to privacy, Justice Blackmun noted:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of the rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

The Fourteenth Amendment played a larger role in the Court's reasoning. Importantly, however, the right to privacy, initially thought to be supported by the Ninth Amendment, was expanded to protect a highly controversial "right." No longer were "unenumerated rights" unanimously desired protections, but rather what some believed improper restrictions on state power. Critics of *Roe* shared similar concerns with those who supported the Ninth Amendment.

The companion case to *Roe*, *Doe v. Bolton* (1973), involved a challenge to Georgia's abortion laws. In his concurrence, Justice Douglas elaborated on the scope of Ninth Amendment unenumerated rights:

> The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. […]
>
> First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. These are rights protected by the First Amendment, and in my view, they are absolute, permitting no exceptions […]. The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs […] is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail […]. *All of these aspects of the right of privacy are rights "retained by the people" in the meaning of the Ninth Amendment* [emphasis mine].
> […]
> This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." […] That Right includes the privilege of an individual to plan his own affairs, for "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."
>
> [Lastly] is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.[140]

[140] Ibid, 53-55.

Justice Douglas' opinion seems incorrect. According to him, the Court can examine the Bill of Rights and determine other unenumerated rights protected from state control (i.e. the right to be let alone). Douglas argued that these rights are protected by the Ninth Amendment. The Ninth Amendment, however, was intended to protect states' rights to govern these affairs and protect the interests of their people. "The people" probably did retain these rights, but only as matters of state law, embedded in their respective state constitutions and statutes. The Ninth Amendment was not intended to expand an individual right to privacy to such an unprecedented level.

In 1984, the Court heard *Massachusetts v. Upton* (1984), which involved a burglar claiming that the warrant used to arrest him violated probable cause requirements. In a break from the typical expansion of individual rights, *Upton* included an unusual endorsement of the "federalism" model of the Ninth Amendment. Justice Stevens, discussed the Ninth Amendment in his concurrence:

> The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." To the extent that the Bill of Rights is applicable to the States under the Fourteenth Amendment, the principle embodied in the Ninth Amendment is applicable as well. The Ninth Amendment, it has been said, states but a truism. *But that truism goes to the very core of the constitutional relationship between the individual and governmental authority, and, indeed, between sovereigns exercising authority over the individual* [emphasis mine].
>
> In my view, the court below lost sight of this truism, and permitting the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts under Art. 14 of the Massachusetts Declaration of Rights. *It is of course not my role to state what rights Art. 14 confers upon the people of Massachusetts; under our system of federalism, only Massachusetts can do that* [emphasis mine]. The state court refused to perform that function, however, and instead strained to rest its judgment on federal constitutional grounds.
>
> *Whatever protections Art. 14 does confer are surely disparaged when the Supreme Judicial Court of Massachusetts refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States* [emphasis mine].[141]

Stevens' opinion is compatible with Madison's "federalist" Ninth Amendment. The state of Massachusetts retains the right to interpret its own probable cause requirements for criminal

warrants. The Supreme Court of Massachusetts cannot disparage Massachusetts' power by examining the enumeration of rights in the Constitution and concluding that Massachusetts does not retain that power. To do so would give the Constitution the sort of "latitudinous construction" Madison wished to prevent with the Ninth Amendment!

Unfortunately, Justice Stevens' "federalist" interpretation of the Ninth Amendment represents an exception, rather than a new trend in Ninth Amendment jurisprudence. Afterward, in citing *Griswold* without commenting on the Ninth Amendment and its relation to privacy, some members of the Court continued to endorse the incorrect reading of the Ninth Amendment that began with *Griswold.* In *Bowers v. Hardwick* (1986), the Court refused to apply the right to privacy to homosexual sodomy. The majority did not mention the Ninth Amendment. In dissent, however, Justices Blackmun, Brennan, Marshall, and Stevens urged the Court to consider it:

> I disagree with the Court's refusal to consider whether […] runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. […] Respondents complaint expressly invoked the Ninth Amendment […] and he relied heavily before this Court on [*Griswold*], which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy.[142]

In *Bowers,* the Ninth Amendment was still considered a possible reservoir of individual, unenumerated rights, including the right to privacy. Nowhere was the Ninth Amendment used to defend Texas's right to decide its own policy concerning homosexuality.

Planned Parenthood of Southeast Pennsylvania v. Casey (1992) marked a radical shift toward the original "federalist" Ninth Amendment. The Court struck down Pennsylvania's abortion laws, which required a woman seeking an abortion to comply with rules prior to the

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[141] Ibid, 62.
[142] Ibid, 65.

procedure. In their dissent, Justices Scalia, Rehnquist, White, and Thomas criticized the Court's past reliance on the Ninth Amendment as an unlimited source of individual rights:

> All manners of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court – not just those mentioned in the text or established in the traditions of our society. *Why even the Ninth Amendment – which says only that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" – is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at "rights," definable and enforceable by us, through reasoned judgment* [emphasis mine].
>
> If, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school – maybe better. If, indeed, the liberties protected by the Constitution are, as the Court say, undefined and unbounded, then the people should demonstrate, to not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.[143]

Justice Scalia warned of the danger in finding a "boundless source of additional, [unenumerated] rights." To use the Ninth Amendment for such a purpose would endanger popular sovereignty ("Value judgments, after all, should be voted on, not dictated."). The dissenters in *Casey* were correct that the Ninth Amendment was never intended to be a vast source of individual rights. Rather, it was meant to protect the peoples' rights to make value judgments in their respective states, under the principle of federalism shared by the Tenth Amendment.

Ultimately, a close examination of Ninth Amendment jurisprudence reveals that the Supreme Court's interpretation of the Ninth throughout the past half-century has been mixed and erratic. Though some cases did involve accurate interpretations of the Ninth Amendment's original intent, they were usually offered in dissent rather than the majority. Unfortunately, the record seems to reflect a general misunderstanding of the Ninth Amendment. After the Ninth Amendment lost its "federalist" connection to the Tenth Amendment, it experienced a

[143] Ibid, 68-69.

renaissance as a vast, libertarian source of individual rights. Such an interpretation is surely anachronistic and contrary to Madison's wishes. To what extent extending the "penumbras and emanations" of enumerated rights violates the Ninth Amendment is unclear. Even James Madison and the Federalists struggled over such a question throughout the Bank Controversy. Which "latitudinous constructions" are "improper" seems to be a decision for responsible judicial judgment. To use the Ninth Amendment to support "penumbras," however, is to adopt a flawed interpretation of the Bill of Rights.

VIII. The Role of Originalism and the Future of the Ninth Amendment

Whether the Supreme Court was correct in its interpretations of the Ninth Amendment's meaning is an empirical matter. Recent scholarship suggests that the amendment's original purpose can be rooted in objective, historical fact. Whether the original meaning of the Ninth Amendment should play a role in how it is used – that is, a prescriptive judgment – is another matter. In fact, the Ninth Amendment's original meaning has always been closely tied to the popularity of *originalism* in legal theory. A close examination of originalism's role in Ninth Amendment jurisprudence reveals that its future will influence the Ninth Amendment's fate.

Originalists argue that proper interpretations of the Constitution require an examination of the original text, the intentions of the Framers, and the public understanding of the text during ratification.[144] Proponents of originalism feel that it provides an objective version of the Constitution, consistent with the wishes of the Founders. Such a philosophy supposedly allows the Constitution to avoid subjective value judgments and to carry the Framers' wishes into the future. The Constitution, then, is a permanent document with a fixed meaning.[145] Nonoriginalists endorse a "living constitution," which evolves and changes with improving

[144] Dennis Goldford, *The American Constitution and the Debate Over Originalism* (USA: Cambridge University Press, 2005), 60.

cultural norms. They argue that the Framers never could have foreseen changing circumstances, technology, cultural values, and legal controversies that developed throughout the last two hundred years. Thus, the Constitution should continue to evolve, adapting to a changing and improving society.[146]

The history of the Ninth Amendment is closely tied with that of originalism. Historical evidence now suggests that most of the Founding generation took originalism for granted. To interpret the Constitution in the years following ratification, legal scholars looked to the wishes of the Framers to derive the original meaning of the text. Even the primary architect of the Bill of Rights, James Madison, was a strong proponent of originalism. Thus, Madison discussed the origins of the Ninth Amendment during his speech on the Bank of the United States. He traced the amendment's history from its genesis in state ratifying conventions to its final language referring to "rights retained."[147] Moreover, nearly every major legal figure between 1820 and 1880 assumed originalism to be the primary tool in constitutional interpretation.[148] Notably, the Ninth Amendment was almost exclusively viewed as a protection of state powers during that era. Every court case citing it noted its connection to the Tenth Amendment, and it was never seriously regarded as a source of individual rights.[149]

Between 1890 and 1930, originalism was still assumed to be the proper method of constitutional interpretation, but little historical research was conducted to support it. Judges rigidly applied what they assumed to be original intent and then decided cases based on their findings about specific "rules."[150] Concurrently, the Ninth Amendment increasingly began to be

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[145] Ibid, 57-62.
[146] Ibid.
[147] "The Lost Original Meaning," 391-392.
[148] Johnathan O'Neill, *Originalism in American Law and Politics* (Baltimore and London: The Johns Hopkins University Press, 2005), 23-24.
[149] "The Lost Jurisprudence," 613-646.
[150] O'Neill, 25-28.

viewed as a "truism," emphasizing the federalist principle preserved in the Tenth Amendment. The original purpose of the Ninth Amendment became obscured, and the Court established precedent expounding the passive nature of the Ninth.[151]

Soon thereafter, the Supreme Court moved away from originalism and embraced *legal realism*, the view that judges should use more discretion in deciding between competing societal desires. This movement paved the way for the next generation of constitutional scholars.[152] As legal realism and progressive politics developed, the idea of a "living constitution" gained support. Judges wished to achieve political results in areas they felt were insufficiently addressed by the original intentions of the Framers.[153] Subsequently, as the Supreme Court reached the New Deal era, it embraced the concept of a "living constitution."[154] The Ninth Amendment then lost its connection to federalism and its active rule of construction. As the Court increasingly pushed to expand the federal government and regulatory programs, it insisted that the Ninth Amendment states "but a mere truism" and cannot serve as a check to federal expansion. In a radical shift in philosophy, the Court rejected precedent establishing the Ninth as an active protection of state power.[155]

In the 1950s and 1960s, the Supreme Court practiced "process jurisprudence," endorsing a "living constitution" but striving to show vigorous self-restraint and to avoid subjective and unsupported constitutional interpretations.[156] As the popularity of originalism faded, the Court began to find that the Ninth Amendment was originally intended to protect individual rights (i.e. privacy) from the states. In *Griswold* (1965), Justice Goldberg made a historical blunder, noting:

[151] "The Lost Jurisprudence," 642-679.
[152] O'Neill, 29-30.
[153] Ibid, 30.
[154] Ibid, 35.
[155] "The Lost Jurisprudence," 689-691.
[156] O'Neill, 59-64.

[The] Court has had little occasion to interpret the Ninth Amendment. [...] [A]s far as I am aware, until today this Court has referred to the Ninth Amendment only in [...] *United Public Workers v. Mitchell, Tennessee Electric Power Co. v. TVA,* an *Ashwander v. TVA.*
[…]
The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language.[157]

As the Court abandoned its emphasis on originalism and the study of the Ninth's original meaning, it overlooked nearly all of the amendment's judicial history. By contrast, Justice Hugo Black, a strong supporter of originalism, denied that the government is prohibited under the Ninth Amendment from invading its citizens' privacy.[158] He argued in *Griswold* that:

> […] [E]very student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.
> …
> Until today, no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison little wonder.[159]

Thus, a proponent of originalism endorsed a correct version of the Ninth Amendment's original meaning. After the Ninth Amendment was misinterpreted for decades, however, Justice Black's historical analysis made an appearance only in dissent.

After 1973, when the Court expanded unenumerated rights in *Roe v. Wade* and *Doe v. Bolton*, it was criticized for its subjective constitutional interpretations and its lack of judicial restraint. Many proponents of a "living constitution" abandoned judicial restraint and urged the Court to take an active role in advancing the liberal political agenda.[160] No longer was the Ninth Amendment's original meaning a matter of serious concern. Instead, it was seen as a vast reservoir of individual, unenumerated rights.

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[157] "The Lost Jurisprudence, 709-710.
[158] Goldford, 50.
[159] Prince, 46.
[160] O'Neill, 98-101.

As a result, dissenters such as William Rehnquist and Justice Harlan began to criticize the Court for legislating political issues without a historical mandate to do so.[161] Originalism experienced an energetic rebirth, as Raol Berger published *Government by Judiciary*, one of the most important works ever devoted to original intent. New originalists argued that originalism grounds interpretation in objective, historical fact and avoids judicial activism.[162] In the wake of the renewed originalism debate, Robert Bork was nominated for Associate Justice of the Supreme Court. As one of the strongest proponents of originalism, Bork was asked about his views on the Ninth Amendment's original meaning.[163] He likened the Ninth Amendment to an "ink blot," whose meaning and history were shrouded in mystery.

The rise of originalism paved the way for Randy Barnett's work on the original meaning of the Ninth Amendment. Relying primarily on post-New Deal jurisprudence, Barnett concluded that the Ninth Amendment protects individual rights. Lash responded, uncovering the lost history and jurisprudence of the Ninth Amendment and reestablishing its "federalist" roots.

The rise of "living constitutionalism" and the move from original intent did not necessarily lead to inaccurate interpretations of the Ninth Amendment's meaning. There are probably a number of factors that led to its original purpose being obscured. Nevertheless, a striking trend links the evolution of originalism and the Ninth Amendment. For the first one hundred and fifty years after ratification, originalism was the dominant method of interpretation, and the Ninth Amendment retained its roots in Madisonian federalism. Only after originalism was abandoned was the Ninth used to restrict state power. Moreover, as "living constitutionalism" was criticized and originalism has regained popularity, the federalist history of the Ninth Amendment has been uncovered and refined.

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[161] Ibid, 105-106.
[162] Ibid, 111-134.

There are, of course, some who deny the importance of originalism in determining how the Ninth should be used. Perhaps the original intent of the Framers is outdated, and the Ninth *should* vest "the people" with unenumerated rights protected from state regulation. The respective values of originalism and "living constitutionalism" are obviously far beyond the scope of this paper. It does seem, however, that the Ninth Amendment's future hinges on the outcome of that debate. The Ninth Amendment's rule of construction lies in opposition to the majority of modern unenumerated rights jurisprudence. Adopting the Ninth's original meaning could invalidate legal precedent long assumed to establish modern privacy rights, placing those rights under domain of the states. Thus, endorsing the Ninth's original purpose and giving it an active function would be undesirable to many who support that precedent. How the Ninth Amendment should and will be applied in the future remains uncertain.

IX. Conclusion

Despite this uncertainty, the future of Ninth Amendment research is bright. Beginning with Randy Barnett's work in the 1980s, the Ninth Amendment has been the subject of renewed interest and rigorous scholarship. The Ninth's original meaning continues to be refined and explored as scholars inch closer to correct understanding. Perhaps Randy Barnett's hope to form a scholarly consensus on the issue will not be in vain.

In contrast with its future, the Ninth Amendment's past has been a sad one. The Ninth Amendment was a key factor in ratification, representing one of the primary fears of state conventions. Together with the Tenth Amendment, the Ninth was intended to restrain and protect the structure of the new American government. It is ironic that such an important amendment, and its complicated history, have been "denied and disparaged" as much as the rights it is supposed to protect. Forgotten by scholars and used almost in direct contradiction to

[163] Ibid, 170-184.

its original purpose, the Ninth Amendment stands alone as an infamous "ink blot" to be examined with wonder.

The debate between Randy Barnett and Kurt Lash marks only the beginning of the Ninth Amendment's resurgence into the public sphere. It is up to responsible historians, legal scholars, and the public at large to evaluate the historical evidence and resurrect the Ninth's rule of construction. Without recognition of the Ninth Amendment's central importance to our country's history, it will remain disparaged and misunderstood. Ultimately, the fate of the "federalist" Ninth Amendment lies in the hands of "the people."

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